IN THE SUPREME COURT OF MISSOURI

No. SC92582

RALPH BROWN,
Plaintiff/Appellant,
v.
MISSOURI SECRETARY OF STATE ROBIN CARNAHAN and MISSOURI STATE AUDITOR THOMAS A. SCHWEICH,
Defendants/Respondents,
and
MISSOURIANS FOR HEALTH AND EDUCATION, *et al.*,
Defendants-Intervenors/Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel R. Green, Judge

APPELLANT BROWN'S REPLY BRIEF

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STATEMENT OF FACTS

Intervenors' statement of facts refers to an existing statutory provision as a "loophole" and claim that this provision allows certain tobacco manufacturers to have "nearly a $6 per pack pricing advantage over other tobacco manufacturers." Intervenors' Br. at 12 n.2, 27 and 28. They then state the proposed measures would close the loophole. *Id.* But the citations in the exhibits cited for this statement of fact reveal no discussion of a "loophole" or a "price advantage," much less one that is *$6 per pack*. There is some discussion in the record about a price per *carton* differential between certain manufacturers. Pl. Ex. 37. A carton is normally 10 packs of cigarettes. *See* §149.055.4, RSMo 2000. Although the Intervenors' statements about the existing statutes are wholly irrelevant, Brown wants the record to be clear. This Court should disregard these statements as they do not comply with Rule 84.04(c) and/or Rule 84.04(i).

ARGUMENT

I. THE STATUTORY HISTORY OF THE BALLOT TITLE AND THE FISCAL NOTE

In light of Respondents' arguments about the interpretation of the statutes at issue in this case, it is important to review the history of the statutory safeguards around the initiative petition process. Reviewing these changes enlightens the Court as to the legislative intent in making them. "Legislative changes should not be construed as useless acts unless no other conclusion is possible." *Baugus v. Director of Revenue*, 878 S.W.2d 39, 41 (Mo. banc 1994).

The statutory requirement for a "ballot title" has changed over time. In 1909, the "ballot title" was distinct from the "legislative title of the measure." The "ballot title" was prepared by the Attorney General and required to state "the purpose of the measure." § 6751, RSMo 1909 (App. A4). That statutory scheme also allowed for circuit court review of a ballot title for insufficiency or unfairness. *Id.* The state-prepared ballot title did not appear on the petition pages that were circulated for signatures. *Id.*, § 6748, RSMo 1909 (App. A2-A3).

In 1977, the legislature changed the process.[1] The ballot title was renamed "official ballot title," but was still written by the attorney general after signatures had been submitted. § 126.081, RSMo Supp. 1977 (App. A39-A40). The fiscal note and

[1] *Cf.* Ch. 126, RSMo 1969 (App. A29-32), Ch. 126, RSMo Supp. 1971 (App. A33-A37) and Ch. 126, RSMo Supp. 1977 (App. A38-A40).

fiscal note summary first appeared. *Id.* Court review was expanded to include challenging the fiscal note or the fiscal note summary. *Id.*

In 1985[2], the legislature required that a petition be approved prior to circulation. §§ 116.332 and .334, RSMo Supp. 1985 (App. A58). If the petition form was approved, the Secretary prepared a petition title for circulation for signatures as well as the ballot title voters would see. § 116.334, RSMo Supp. 1985 (App. A58). It appears that the ballot title was still a statement of purpose. *Id.*

In 1996, after *Thompson v. Committee on Legislative Research*, 932 S.W.2d 392 (Mo. banc 1996), found it unconstitutional for the Joint Committee to prepare fiscal notes and fiscal note summaries for initiative petitions, the General Assembly assigned those duties to the Auditor and enacted section 116.175. S.B. 132 (89th General Assembly, First Regular Session), *Laws of Missouri*, 1997, p. 428 (App. A69). Section 116.334 was amended to restate the Secretary's role. *Id.* at 430 (App. A71). The legislature added an additional phrase, now requiring the Secretary to prepare "a *summary statement of the measure which shall be a* concise statement" of 100 words or less, in the form of a question, and "using language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." *Id.* The last vestiges of the

[2] In 1980, the statutes were moved from Chapter 126 to Chapter 116. Ch. 116, RSMo Cum. Supp. 1980 (App. A46-A55). The basic process as set forth above remained unchanged, however.

"statement of purpose" were repealed by S.B. 132. *Id.* The statutes have remained essentially the same since that time.

II. THE SUMMARY STATEMENT IS INSUFFICIENT AND UNFAIR

Respondents' briefs urge this Court to adopt a "notice" standard for summary statements. Respondents want to ignore statutory changes that moved the requirement from a simple notice of purpose to a requirement that the Secretary accurately summarize the main points of the initiative. The standard is not notice, but rather the standard is contained in the language of the statute. The Secretary failed to meet her responsibilities here and Respondents' arguments are unavailing.

A. The Standard

Both the State and Intervenors argue that a summary statement complies with section 116.190, RSMo 2000, when it "makes the subject of the initiative petition evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal." State's Br. at 18; Intervenors Br. at 23-24.

The plain language of section 116.334, RSMo 2000, does not require "notice of purpose." It requires a "summary statement of the measure." Although past versions of the statutes did appear to require that the title only set forth the purpose of the measure, the requirements were changed in 1997.

1. The plain language of the statutes and the 1997 Amendments

The legislature "says in a statute what it means and means in a statute what it says there,"[3] *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 120 S.Ct. 1942, 1947 (2000); accord *Emery v. Wal-Mart Stores, Inc.,* 976 S.W.2d 439, 449 (Mo. banc 1998). This Court is to look at the plain language and in the absence of a statutory definition, give those words their plain and ordinary meaning as found in a dictionary. *Devitre v. The Orthopedic Ctr. of St. Louis, LLC*, 349 S.W.3d 327, 333 (Mo. banc 2011).

Contrast the definition of summary statement, discussed in the opening brief, with the definition of the standard advocated by Respondents. "Notice" – "an intimation of something." WEBSTER'S THIRD NEW INT'L DICTIONARY 1544 (2002). "Intimation" is "an indirect usually hinted suggestion." *Id.* at 1184. Similarly, "purpose" is "an object, effect or result aimed at, intended or attained." *Id.* at 1847. The plain language of the statutes clearly requires more than an indirect hint at the result intended.

With apologies to Dr. Seuss, the legislature meant what it said and said what it meant; this Court should be faithful one hundred percent. The Secretary is not to provide general notice of the purpose of a measure; she is to write a summary statement of the measure. This Court should interpret the phrase "summary statement" using the dictionary definitions.

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[3] Perhaps the High Court was referencing Dr. Seuss' book, *Horton Hatches the Egg*, wherein Horton the Elephant famously exclaims: "I meant what I said and I said what I meant. And an elephant's faithful, one-hundred percent!"

The legislative history also reveals that although notice of purpose was once the standard, that is no longer the case. "Legislative changes should not be construed as useless acts unless no other conclusion is possible." *Baugus*, 878 S.W.2d at 41. By repealing the "purpose" language in an earlier statute and replacing it with a requirement of a "summary statement" the legislature clearly intended to effect a change and to require something different than simply notice of purpose. Respondents now ask this Court to change the legislative intent and return the law to the way it was before the legislature made the change.

2. Clear title cases do not apply

No doubt there are Court of Appeals cases that mention the "notice" concept in the context of a summary statement challenge, notably *Bergman v. Mills,* 988 S.W.2d 84, 92 (Mo. App. 1999) (a referendum summary statement challenge). *Bergman* is relied upon in both Respondents' briefs. Intervenors' Br. at 25 and 34; State's Br. at 20 and 22.[4] But the cases that discuss a notice standard in the context of section 116.190 inevitably cite to *Union Electric v. Kirkpatrick,* 678 S.W.2d 402 (Mo. banc 1984) and *Union Electric v. Kirkpatrick,* 606 S.W.2d 658 (Mo. banc 1980). The problem is the *Union Electric* cases were challenges to the Constitutional requirements concerning a single subject being clearly expressed in a title. They analyze a different, constitutional, standard rather than the statutory standard at issue in this case. Summary statement cases citing the *Union*

[4] *Bergman* is not included in the State's table of authorities.

Electric cases are simply citing to a different line of case law and engrafting language from the wrong analysis.

Further complicating the issue is Respondents' citation to *United Gamefowl Breeders Ass'n of Mo. v. Nixon*, 19 S.W.3d 137 (Mo. banc 2000).[5] *United Gamefowl* was likewise not a statutory challenge that a summary statement is unfair and insufficient. Instead it was a Constitutional clear title (and single subject) challenge to an initiative petition. *Id.* at 139. The case was not a challenge under section 116.190 – it couldn't be because it was brought not only after signatures were turned in but also after the election. *Id.* at 138-39. This Court applied the correct standard for a *clear title* challenge, "whether the ballot title makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal." *Id.* at 140. The Court was not presented, and did not reach, the issue of whether a ballot title prepared before circulation has complied with statutory requirements.

3. The dicta in *United Gamefowl*

Unfortunately, after setting forth the correct "notice of the purpose" standard for clear title challenges, the Court went on to state:

> A ballot title meeting this test is not "insufficient or unfair." Section 116.190.3, RSMo Supp. 1997*; Hancock v. Secretary of State,* 885 S.W.2d 42, 49 (Mo. App. 1994); *Bergman v. Mills,* 988 S.W.2d 84, 92 (Mo. App. 1999).

[5] State's Br. at 19 and 22; Intervenors' Br. at 23-25.

The *per curiam* opinion sets forth no reasoning as to why it continued beyond what was necessary to render its ruling in the case. As already noted, the Court's commentary was not necessary to the Court's holding that the ballot title did not contain multiple subjects and did not violate the Constitutional requirement of a "clear title." If this Court believes the language was necessary to the holding, then the language is incorrect. Section 116.190 requirements are different from Constitutional clear title requirements and require a different analysis.

4. The correct standard

The legislature did not direct the Secretary to simply provide notice of the subject of the initiative and send voters to the initiative itself. Rather the language of the statute is more specific and requires a summary statement.

This Court is well familiar with the clear title and single subject cases discussed by Respondents. *See, e.g., Trout v. State,* 231 S.W.3d 140 (Mo. 2007). The point of the Constitutional provisions discussed in those types of cases is indeed to give "notice," not to "summarize" the content of the measure. No one can seriously argue that a title like that discussed in *Trout,* "relating to ethics," even made an attempt to summarize the measure. *See, e.g., Jackson Co. Sports Authority v. State,* 226 S.W.3d 156 (Mo. banc 2007); *Missouri Ass'n of Club Executives v. State,* 208 S.W.3d 885 (Mo. banc 2006).

This Court has never decided what the analysis should be for a challenge to a summary statement under section 116.190. And as noted in Appellant Brown's opening brief, the two Court of Appeals cases that have found summary statements insufficient or unfair actually applied the correct standard, which is *not* mere notice of the general

purpose. *Missouri Mun. League v. Carnahan*, 303 S.W.3d 573 (Mo. App. 2010); *Cures without Cloning v. Pund*, 259 S.W.3d 76 (Mo. App. 2008). This Court can and should set forth the correct standard, and that standard is in the plain language of the statute. The summary statement must contain a short statement of the main points of the initiative, not just provide some general notice of what the measure addresses.

B. The Deficiencies in this Particular Summary Statement

Respondents next argue that Appellant is asking for the addition of words to the summary statement and that *United Gamefowl* holds that the title need not set forth every detail of the proposal. But *Gamefowl* is a clear title case, not a section 116.190 summary statement case. *Id.* at 138-39. *Gamefowl* was also about omitting information from the summary statement, not whether the statement was inaccurate. *Id.* at 140.

Brown argues that the summary statement is *wrong*. Wrong is not the same as not having enough words or omitting details. It may be that adding words would cure the inaccuracy, but that does not change the basis of the claim of insufficiency or unfairness.

Respondents argue, of course, that the summary statement is not wrong. First, they argue that by saying revenues can be used for certain things the Secretary is fairly informing the public even though the truth is that the funds will be used for more than what the Secretary says. The State takes Brown to task for invoking the maxim that the expression of one is the exclusion of others. State's Br. at 25. Of course, the original point is that the maxim is a grammatical maxim as well. For example, if someone says "I need money to feed my children," the common understanding would be that the money would only be used for that purpose and not to also buy beer and lottery tickets. It is the

Secretary's failure to give any indication that the funds may be used for other purposes that makes the statement unfair.

This unfairness could have easily been cured by simply telling the truth: the funds may be used for various programs. Or it could have been cured by not including the specific programs at all, i.e. "used for various programs."[6] But telling potential signers the measure will use funds for specific programs is deceptive. Indeed, it violates the state's own proposed "notice" standard because it fails to put readers on notice that they should consider what programs may be funded.

Next, the State argues that the statement about the measure changing the amount which must be held in escrow funds "before" an escrow refund is actually true. All that can be said on this is to ask the Court to read the language itself. The language does indeed affect the amount that must be maintained in escrow *after* an escrow refund. But the initiative does not alter the amount that must be deposited and maintained *before* an escrow refund. The Secretary's summary says the amount to be maintained *before* an escrow refund is being changed when it is not in fact being changed.

[6] Intervenors claim that Brown wants to add "four more details" to the summary statement and exceed the 100 word limit. Intervenors' Br. at 24. Of course, the opening brief requests no such thing. Brown did offer a suggested alternative summary statement to the trial court, which was within the 100 word limit. Pl. Ex. 40.

The State's brief quotes only part of the summary statement and says that the amount "product manufacturers must maintain in their escrow accounts"[7] is in fact changed. But the State leaves out the crucial phrase "before any funds in escrow can be refunded." State's Br. at 27. This later phrase is not included in the State's argument on the issue, which may be a tacit acknowledgement that the phrase is incorrect.

III. THE FISCAL NOTE SUMMARY IS INSUFFICIENT AND UNFAIR

The opening brief specifies that the fiscal summary exceeds the statutory authority of the auditor and that it "mischaracterizes" the measure "and therefore is insufficient and unfair." Appellant's Br. at 48. Nevertheless, the State claims the "sole challenge of the sufficiency and fairness of the fiscal note summary is the assertion that the Auditor reached beyond his authority." As argued in the opening brief, the sentence "the revenue will fund only programs and services allowed by the proposal" is *both* unauthorized and a mischaracterization. If the Auditor does have the authority to include this commentary, it is nevertheless a mischaracterization. See *Missouri Mun. League (MML I),* 303 S.W.3d at 583.

A. The Auditor's Authority to Comment on the Measure

[7] The State's Brief, at page 27, quotes language from the summary and places a period after the phrase "maintain in their escrow accounts." In the actual summary, there is no period after the word accounts. Instead the sentence goes on to include the purposes of the escrow and then the phrase "before any funds in escrow can be refunded to the tobacco product manufacturers. . ." The fact that no such period appears is important.

The Auditor argues that he has the authority to assess "fiscal impact" and therefore can say whatever he wants in the fiscal note and summary as long as he can tie it to fiscal impact. The Auditor offers no limit on where his ability to comment on "fiscal impact" might end. But the language of the statute tells a different story.

Section 116.175.1, RSMo Cum. Supp. 2011, requires the Auditor to "assess the fiscal impact" of a proposed measure and how he will do that. But then, when the fiscal impact analysis is done, the statute specifies that the auditor shall prepare a fiscal note and a fiscal note summary. § 116.175.2. That note and summary are limited to the measure's estimated cost or savings if any. § 116.175.3. Although the Auditor may assess the impact, the results of that impact – what gets communicated to potential signers of the initiative -- is limited to "cost or savings." *Id.*

The Auditor urges a "common sense reading of the statute" rather than a plain language reading. State's Br. at 37. This Court is limited to what the legislature said, not what the Auditor thinks it should have said. Moreover, the fact that the legislature gave the responsibility of summarizing the high points of the measure to the Secretary of State also points out that the legislature did not intend the Auditor to perform this function. The Auditor's designee at trial acknowledged openly that he believed the phrase would be properly included in the Secretary's portion, but since he did not have the benefit of seeing the Secretary's work, he put it in himself. Appellant's Br. at 46.

At trial, the Auditor acknowledged that the challenged sentence was not a statement of cost or savings. Pl. Ex. 33, Dep. 46:7-48:17. The Auditor's brief agrees it is not cost or savings, but rather argues it was "part of the calculation" of savings. State's

Br. at 38. These admissions by the Auditor make clear that he is asking the Court to insert additional words in the statute, which simply do not appear there.[8]

The Auditor also places much reliance on *Hancock v. Secretary of State,* 885 S.W.2d 42 (Mo. App. 1994). The Plaintiff there did not raise whether the drafter of the summary had the authority to include such information, rather the challenge had to do with whether the language was an accurate summary of the fiscal note. Perhaps this is the reason Intervenors' very thorough brief does not argue that *Hancock* applies.

To the extent this Court would be required to follow the decision in *Hancock,* which it is not, *Hancock* did not address the precise issue presented in this case and therefore is not helpful. Relying on it would be like relying on the numerous Court of Appeals cases that analyze the fiscal note summary of the Auditor to support the proposition that the Constitutionality of his statute has been upheld. Similarly, the opinion in *Hancock* does not even discuss what is required in the fiscal note summary, only the language in that particular summary.

B. The Mischaracterization

Nor did *Hancock* address a claim that the fiscal note summary deceived the voters by leading them to believe that funds generated would be limited to a certain set of

[8] Intervenors argue that a logical extension of the argument is that "cost or savings" cannot include "revenues" and Brown's failure to raise it weakens the argument. Brown's opening brief expressly addressed why the issue is not raised here, although it might have merit with the proper record. Appellant's Br. at 45, note 5.

programs when the measure did not so limit. The Auditor deals with Brown's contention by saying that the summary does not tell potential signers that uses for revenue would be limited to the programs in the *summary statement* but rather tells signers the uses of revenue are limited to the programs described in the *measure.* The Auditor tacitly acknowledges that telling signers it was limited to the programs in the summary statement would be unfair

The Auditor ignores the fact that the Secretary's summary statement tells voters the funds may be used for specific programs without disclosing that those words *are not* words of limitation. This information is immediately followed by the Auditor telling signers that the revenues can only be used for programs in the measure. If the Secretary has adequately summarized the measure then the Auditor's statement is misleading. If the Secretary had summarized the measure correctly, the Auditor's statement might be fair. But as it is, the official ballot title very clearly tells signers that the revenues are limited to certain programs, and it is just not true.

IV. DECLARATORY JUDGMENT THAT SECTION 116.175 VIOLATES MISSOURI'S CONSTITUTION

The Auditor admits that the last sentence of article IV, section 13 is intended to limit his authority. State's Br. 41. The Auditor posits the question as whether preparation of a fiscal note is related to the receipt or expenditure of public funds. *Id.* at 43. But the Auditor's analysis fatally omits the words immediately following "not related to" – *the supervising and auditing of* – the receipt and expenditure of public funds, reading words out of the Constitution like this:

> No duty shall be imposed on him by law which is not related to ~~the supervising and auditing of~~ the receipt and expenditure of public funds.

These words are not fluff that can be ignored. Moreover, the Auditor ignores Brown's argument that there is no receipt or expenditure of public funds at the time the auditor does the fiscal note and summary – in fact there is no guarantee there will ever be any receipt or expenditure. The Auditor prepares fiscal note summaries for dozens of initiatives which are never even circulated for signature. Examples would include the other versions of this particular initiative for which notes were prepared and litigated over, but signatures apparently not turned, in as well as other appeals before this Court where a fiscal note and summary were prepared but the Court has stayed the briefing on the suggestion that the issue is moot. In none of those cases can the Auditor's preparation of a fiscal note ever be related to the receipt and expenditure of public funds because those measures will not be on the ballot.

Next, Respondents both argue the legislature may assign the Auditor investigations, and that fiscal notes are investigations. State's Br. at 45, Intervenors' Br. at 48. But the Constitution clearly limits investigations (and all other duties) to those related to the supervising and auditing of the receipt and expenditure of public funds. The fact that a fiscal note could be called an investigation does not end the inquiry. Brown does not concede that the Auditor's mere recitation of information provided by others is an investigation, but even if it is, it is not connected to any auditing or supervising function as thoroughly discussed in Appellant's opening brief.

Both Respondent briefs ignore the limiting phrase at the end of the Constitutional section and neither response brief adequately addresses the discussion in *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. banc 2002) concerning the intent of the drafters in adding the limiting phrase to the Constitution. Indeed, a further review of the debates reveals that Respondents' positions are diametrically opposed to the intent of the provision. Debates of the 1943-1944 Constitutional Convention of Missouri, vol. 13, p. 4005 *et seq.* (App. A83-A85).

The intent was to make sure the Auditor "is to be an auditor and audit all of the accounts and he should do nothing else and that was the purpose." *Id.* These debate sections validate the *Farmer* decision. They also prove the Respondents' arguments wrong. The clear intent of article IV, section 13 is to limit the Auditor to auditing and supervising the receipt and expenditure of public funds.

V. CLAIM PRECLUSION

The issue raised in Appellant's brief is that Ralph Brown has already obtained final, non appealable judgments against the State Auditor on the issue of constitutional authority. The State apparently believes Mr. Brown is required to continue to litigate these matters over and over again even though the State chose not to appeal those earlier judgments. The State admits "claim preclusion can be effectively asserted against the State and state actors where the claim has already been adjudicated on the merits." State's Br. at 48. The record is very clear – that has already happened here. Intervenors argue that Brown should have to litigate the issue again because there were "different parties and different facts." Intervenors' Br. at 54. They are wrong. The claims were

identical and there were no different facts needed to adjudicate them. The addition of an intervenor here does not change the "parties" analysis, which is discussed in Appellant's opening brief.[9]

VI. RESPONDENTS' ARGUMENTS ON REMEDY

Respondents both launch into an unnecessary discussion of remedy when the remedy for the violations is not a ripe issue. The State's brief abandons all pretense of objectivity in this process and openly advocates in favor of the initiative appearing on the ballot. The Secretary of State and the Auditor ask the Court to "Order the Initiative placed on the ballot." State's Br. at 49. Apparently, they request permission to by-pass the Constitutional requirement that the initiative petition contain a sufficient number of signatures as well as the statutory requirement that the Secretary of State review the signatures and the initiative for sufficiency. § 116.150, RSMo 2000.

The Court should decline this request. Whether the measure shall be placed on the ballot is not a decision that may be made at this juncture. Plaintiff Brown requested no

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[9] Intervenors drop a footnote about whether Brown had a res judicata argument at the time of the trial. Intervenors attempt to obfuscate Brown's simple point that the prior cases asserted declaratory judgments. Those judgments were not final for 30 days and the state had 10 days thereafter to appeal, which made them non appealable *the day after trial*. As discussed in Appellant's opening brief, the issue can't be raised until the judgment is final and it is appropriate to raise it at that time even if that means during appeal.

relief of the trial court with regard to whether the measure should be on the ballot. Instead, Plaintiff Brown only requested what the statutes allow – a sufficient and fair ballot title. The issue of what effect a new ballot title has on the initiative is simply not ripe.

Although Intervenors are the partisan advocates for the proposal, even they do not go as far as the State and ask that the measure be placed on the ballot. Instead, they seek a "back door" judgment that other statutes, not challenged by the Plaintiffs, are unconstitutional. Pages 59 and 60 of Intervenors' brief specifically assert that certain statutes are unconstitutional. Intervenors could have raised that claim below, but chose not to, likely because they know it is not a ripe issue. They should not be allowed to now bring the issue up and ask for a declaration. When the Secretary makes a decision on the sufficiency of the petition, the parties will be able to litigate about that decision if they so desire. Until that time there is no case or controversy before this Court on this issue.

However, should this Court take up the issue of whether a ruling on the sufficiency of the ballot title effects the signatures, the Court should ask for separate briefing on that issue as the Court has done in the past. *E.g.*, *Trout,* 231 S.W.3d at 148. As discussed in *Trout,* whether a ruling applies retroactively is a complicated analysis. Supplemental Opinion, *Id.* at 148-157.

Briefly, if the Court strays into advising on future situations that may or may not occur, the Court should acknowledge the impact of what Respondents request. Were the Court to simply ignore the deficiencies in the official ballot title, the Court would essentially be establishing a rule that *even if* a ballot title is insufficient and unfair, and

even if signers were deceived into signing the ballot initiative by a biased and unfair statement from state officials, those signatures obtained under deceptive circumstances should be counted. Intervenors cite no case, anywhere, where such a result was obtained. They rely on *Thompson v. Committee on Legislative Research,* which was a case filed after signatures had been obtained, not before. Of course the remedy there was to cover up the fiscal note on the ballot as no one had raised the issue before signatures were gathered.

As discussed in Appellant's opening brief, allowing signatures to be gathered and counted with a deceptive ballot title would be an abandonment of procedural safeguards and a tipping over of the scale that balances the right of citizens who wish to enact a law against the rights of those who are opposed to the law. *Buchanan v. Kirkpatrick,* 615 S.W.2d 6 (Mo. banc 1981). It puts this Court in dangerous waters. Moreover, unlike in *Thompson,* Appellant brought this action prior to any signatures being turned in and it was tried on an expedited basis. Intervenors inserted themselves into the litigation and had full knowledge that the Appellant was asking the ballot title to be set aside. They were on notice that they might be gathering signatures on a deceptive ballot title but failed to request a new one or to move the litigation forward in time to correct the problem. To say that Brown may not obtain relief because of delays in bringing the case to trial – which were not his fault – raises serious policy issues that should be addressed more specifically, with greater deliberation and in a scenario with a fully developed record.

VII. AN INSUFFICIENT OR UNFAIR SUMMARY STATEMENT IS PROPERLY REWRITTEN BY A COURT

Footnote 3 on page 19 of the State's brief suggests an unfair or insufficient summary must be returned to the Secretary rather than changed by the Courts. The State suggests article III, section 53 of the Missouri Constitution "bestows upon the Secretary the authority to submit all initiatives or referendums petitions to the people," that section 116.334, RSMo 2000, allows only the Secretary to write a summary statement and that no provision of the Constitution or Chapter 116 permits a court to modify a summary statement prepared by the Secretary. Because the likelihood of a rewrite is high, Appellant addresses this footnote on the merits.[10]

A. Separation of powers

Article II, section 1 of the Missouri Constitution provides the basis for the separation of powers doctrine. This provision "has always been liberally construed." *Clark v. Austin*, 101 S.W.2d 977, 987 (Mo. 1937)(en banc). "In practice, the functional lines between . . . political departments are not hard, impenetrable ones. There is a necessary overlap between the functions of the departments of government." *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997).

[10] This section borrows heavily from Point II in the *Reuter* (SC92574) and *Northcott* (SC92500) Briefs, as Brown has the same counsel as Reuter and Northcott. Here, however, the statutory history of the ballot title/summary statement is added as further emphasis and specific statements in the footnote are rebutted.

Violation of separation of powers can occur in two ways: (1) when one branch interferes impermissibly with the other's performance of its *constitutionally assigned power*; or (2) when one branch assumes a power that more properly is entrusted to another. *Id.*

Neither of these types of violation has occurred in this case. The authority to write a summary statement is not a duty imposed on the Secretary by the Constitution, so no violation can occur under the first type. Contemporaneous construction of the constitutional provisions by the General Assembly supports this conclusion. Nor has there been a violation under the second type because: (1) dating back to 1909, the legislature has always allowed circuit court review and rewriting of an insufficient or unfair title or summary statement; and (2) even if it had not done so, the judiciary is only rewriting that portion of the summary statement that was in excess of any discretionary authority granted to the Secretary by statute.

B. The Secretary's authority is not assigned by the Constitution

The Secretary suggests her authority to write summary statements is found in the Constitution, yet she cites no provision[11] because no such provision exists. In fact, the Secretary is mentioned only twice in the various constitutional provisions relating to initiative petitions. Article III, section 50 simply states that initiative petitions proposing amendments to the Constitution or proposing laws must be filed with the Secretary not less than six months before the election. The provision cited by the State, which is the only other initiative provision mentioning the Secretary is article III, section 53. That

[11] State's Br. at 19 n. 3.

provision implies that the Secretary has some role in submitting initiative petitions to the voters, but that is governed by statutes. There is nothing in this article that would cover summary statements.

Article IV, section 14 is the general provision for the Secretary and provides, in relevant part:

> . . . [The Secretary] shall be custodian of such records, and documents and perform such duties in relation thereto, *and in relation to elections and corporations, as provided by law*. . .

(Emphasis supplied). This provision allows the legislature to impose duties upon her related to elections. The first type of separation of powers violation simply cannot exist as regards a court's rewriting of the summary statement because the duty is not assigned to the Secretary by the constitution.

Additional evidence is found in the contemporaneous construction by the legislature of the constitutional provisions. "'Though not conclusive, such interpretation is entitled to great weight and should not be departed from unless manifestly erroneous.'" *School Dist. of Kansas City v. State*, 317 S.W.3d 599, 609 (Mo. banc 2010) (quoting *State ex rel. O'Connor v. Riedel*, 46 S.W.2d 131, 134 (Mo. 1932) (en banc)). From 1909 through 1985, the General Assembly assigned the duty of preparing a ballot title statement to the Attorney General. Clearly, the legislature did not consider the constitution to require it to give that duty to the Secretary, even in 1949, shortly after the 1945 Constitution was adopted. Ch. 126, RSMo 1949 (App. A24-A28).

C. The statutes have historically allowed the circuit court to rewrite an insufficient or unfair title or summary statement

Since 1909, the legislature's grant of authority to an elected official (the Attorney General until 1985, the Secretary thereafter) to write a ballot title or petition title has been unequivocally subject to circuit court review. Thus the grant of authority cannot be considered to have been intended by the legislature to have been solely entrusted to the Attorney General or, subsequently, the Secretary. Separation of powers is not even implicated as regards the summary statement.

D. The statutory authority for the Secretary to prepare summary statements for initiative petitions is limited

Sections 116.190 and 116.334, RSMo 2000 set forth the limits on the Secretary's powers to write a summary statement. The power that she has been given by the legislature is to write a summary statement that is not intentionally argumentative, not prejudicial, not insufficient and not unfair. As long as the Secretary exercises any discretion given to her within these parameters, there is no other branch of government that can interfere. It is only when she has been determined by a court to have exceeded her power, and to have written a summary statement that is, as in this case, insufficient and unfair, that the legislature has authorized the judiciary to rewrite the summary statement.

E. The trial court's authority to "rewrite" the summary statement as set forth in Court of Appeals cases protects from encroachment upon the Secretary's power

If anything in section 116.190 can be interpreted to possibly encroach upon the Secretary's powers (assuming, for argument, that they are vested solely in her), it might be if the trial court completely rewrote the entire summary statement after finding it insufficient or unfair *and* went beyond correcting the summary statement to choose its own wording even in areas where the Secretary had used sufficient and fair language. To the extent this may be a violation of separation of powers, the Court of Appeals has already remedied such a problem through its rulings. *Cures without Cloning*, 259 S.W.3d at 83; *MML I*, 303 S.W.3d 573.

CONCLUSION

Appellant Brown respectfully requests this Court to reverse the trial court's judgment and:

(1) Find that the Summary Statements are insufficient and unfair;

(2) Remand the case to the trial court for certification of a sufficient and fair summary statement to the Secretary of State;

(3) Declare that section 116.175 is unconstitutional as it violates the limitations on the duties that can be imposed on the State Auditor by article IV, section 13; and

(4) Direct the trial court to enter judgment consistent herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned counsel certifies that on this 22nd day of June 2012, a true and correct copy of the foregoing brief was served on the following by eService of the e-Filing System and a Microsoft® Office Word 2007 version was e-mailed to:

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The undersigned counsel further certifies that pursuant to Rule 84.06(c), this brief:

(1) contains the information required by Rule 55.03;

(2) complies with the limitations in Rule 84.06(b) and contains 6,900 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft® Office Word 2007; and

(3) the Microsoft® Office Word 2007 version e-mailed to the parties has been scanned for viruses and is virus-free.

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